IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 998 OF 2003

Sou. Vidya Kisanrao Nimbalkar ... Petitioner
V/s.
The State of Maharashtra & ors. ... Respondents

Mr. Machindra Patil for the petitioner.
Mr. A.Y. Sakhare b/h Ms. Varsha Palav for the respondent No.2.
Mr. Y.S. Shinde, APP for the State.

CORAM : V.R. KINGAONKAR,J.
DATED : 28th July, 2006

P.C.

. Rule. Returnable forthwith. Heard finally with the consent of the parties.

2. This petition is filed by the original complainant against the order passed by the learned IVth Additional Sessions Judge, Thane in Criminal Revision Application No. 49 of 2003.

3. The petitioner filed private complaint (RCC No. 367 of 2001) in the Court of Judicial Magistrate (F.C.), Belapur against three accused persons, including respondent No. 2, who was arrayed as accused No.3. The allegations of the complainant are that she entered into partnership with respondent Nos. 1 and 2 for a business venture style as "M/s. Sanket Packaging Company". A bank account was opened with Cosmos Co-operative Bank Limited, Vashi Branch, Sector

No. 17, Vashi, New Mumbai. The accused Nos. 1 & 2 withdrew certain amount from the said bank account without consent of the complainant. The amounts have been misappropriated by them and the respondent No. 2/original accused No.3 abated him in commissioning of the alleged crime.

4. The learned Magistrate directed the concerned Police to investigate into allegations of the complaint as required under Section 156(3) of the Criminal Procedure Code. The report received from the Police Officer disclosed no incriminating material against respondent No.2, though certain material was allegedly collected as against the original accused Nos. 1 and 2. The learned Magistrate directed issuance of process against accused Nos. 1 and 2 and ordered acquittal of the respondent No. 2 under Section 169 of the Criminal Procedure Code, on the basis of such investigation report.

5. The petitioner challenged the order of the learned Judicial Magistrate by filing Revision Application bearing No. 49 of 2003. The Revision Application came to be dismissed. This order of the Revisional Court is subject matter of the challenge in

the present petition.

6. I have heard learned Counsel for the parties and learned APP Mr. Y.S. Shinde. The learned counsel for the petitioner strenuously argued that the Revisional Court committed error in law by refusing to proceed against the respondent No. 2. He argued that role of the respondent No. 2, as an abator is explicit from the record. One of the grievance putforth by the learned counsel for the petitioner is that the report filed under Section 156(3) of the Criminal Procedure Code was inadequate and should not have been accepted as it is.

7. Having considered the rival submissions, I find it difficult to accept the contentions of the learned counsel for the petitioner. It is significant to note that the petitioner did not object veracity of the police report submitted under Section 156(3) of the Cr. P.C. before the learned Magistrate. Inadequacy or otherwise of the report could be pointed out before the learned Magistrate at the appropriate stage prior to acceptance thereof. True it is that the order of acquittal could not have been passed under Section 169 of the Cr.P.C. The impugned order

of the learned Magistrate was, indeed, a sort of discharge since the complaint could be deemed as dismissed as far as respondent No. 2 is concerned. The learned Additional Sessions Judge has directed that the Judicial Magistrate may be at liberty to take cognizance of the offence against respondent No. 2 as and when incrementing material would be noticed during the course of the trial. Obviously, the powers of the Trial Court under Section 319 of the Cr.P.C. may be exercised if the learned J.M.F.C. would come across any incriminating material against respondent No. 2. The learned Magistrate has not taken cognizance of offence qua the respondent No. 2 and hence it cannot be said that the powers are available to him.

8. As far as the existence of prima facie case is concerned, the learned counsel for the petitioner invited my attention to the fact that an application under Section 438 of the Cr.P.C. was moved by the respondent No. 2, but the same was rejected by the learned Sessions Judge. The observation in such order cannot be used to reach a conclusion that there is incriminating material, as far as respondent No. 2 is concerned, to take cognizance of offence and therefore the learned Magistrate was not supposed to proceed

against respondent No. 2 on assumption of existence of such material.

9. A bare reading of the complaint shows that the petitioner entered into a partnership agreement with the original accused Nos. 1 and 2 on certain terms indicated in the deed of partnership (Exh. "B"). It appears that as per clause 11, the partners were permitted to withdraw any amount during the year from time to time, as they would require for their personal expenses, from their credit, profit and remuneration account. There is nothing on record as to show that respondent No. 3 was instructed to the effect that no payment shall be made to the accused No. 1 or 2 without prior consent of the petitioner. There is nothing on the record to show that respondent No. 2 allowed withdrawal of amount by the accused Nos. 1 and 2 with any fraudulent intention. He was working as an employee of the bank and was supposed to discharge his duties in day-to-day business of the bank. He could not be roped, prima facie, as an abator without there being substantial material on record to infer his implicitly in the commission of alleged offence. In my opinion, there is hardly any reason to interfere in the impugned order.

10. The petition is dismissed. Rule discharged. No costs.

[V.R. KINGAONKAR, J.]